

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELBERT KIRBY, JR. and  
CALEB MEADOWS,

Plaintiffs,

vs.

DAVID M. O'DENS, SETTLEPOU  
and OCWEN LOAN SERVICING,  
LLC,

Defendants.

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No. 14-CV-388-GKF-PJC

**DEFENDANTS' SECOND MOTION FOR  
ATTORNEYS' FEES AND BRIEF IN SUPPORT**

Defendants, David M. O'Dens ("O'Dens"), SettlePou ("SettlePou") and Ocwen Loan Servicing, LLC ("Ocwen") (collectively, "Defendants"), pursuant to Rule 37(a)(5) of the Federal Rules of Civil Procedure, and the Court's Order dated May 14, 2105, move the Court for an Order granting Defendants attorneys' fees in connection with Plaintiffs' Motion for Protective Order [or] alternatively Motion for Sanctions [Docket No. 80], Plaintiffs' Fourth Motion to Compel and Request of Sanctions [Docket No. 94], and Defendants' Fifth Motion to Compel and Brief in Support [Docket No. 93].

## **Background**

### **A. Plaintiffs' Motion for Protective Order.**

In their Motion for Protective Order, Plaintiffs sought protection from Defendants' "atrocities" and asked the Court to disallow depositions until Defendants had served discovery responses and produced requested documents. *Plaintiffs' Motion for Protective Order [or] alternatively Motion for Sanctions* at pg. 3.

Defendants were forced to file a response to Plaintiffs' Motion for Protective Order, detailing Defendants' proper service of their discovery responses. *See generally Defendants' Response to Plaintiffs' Motion for Protective Order [or] Alternatively Motion for Sanctions* [Docket No. 87]. Defendants were also required to attend a hearing on the Motion for Protective Order on May 8, 2015. *See Minutes of Proceedings* [Docket No. 115].

The Court denied Plaintiffs' Motion for Protective Order, finding that Defendants properly served Plaintiffs with their discovery responses. *Opinion and Order* at pg. 7 [Docket No. 118].

### **B. Defendants' Fifth Motion to Compel**

On April 20, 2015, Defendants were forced to file their Fifth Motion to Compel ("Fifth Motion to Compel") due to Plaintiffs' failure to properly respond to Defendants' second set of written discovery. *See generally Fifth Motion to*

*Compel and Brief in Support* [Docket No. 93]. Defendants also attended a hearing on the Fifth Motion to Compel on May 8, 2015. *See Minutes of Proceedings*.

The Court granted Defendants' Fifth Motion to Compel, requiring Plaintiffs to fully answer previously served interrogatories by May 22, 2015. *Opinion and Order* at pg. 8.

**C. Plaintiffs' Fourth Motion to Compel**

Plaintiffs filed their Fourth Motion to Compel and Request for Sanctions ("Fourth Motion to Compel") on April 21, 2015, complaining (among other things) that they had not received Defendants' privilege log nor "the exhibits and evidence not in these categories." *Plaintiffs' Fourth Motion to Compel and Request for Sanctions* at pg. 1 [Docket No. 94].

Defendants filed their response to the Fourth Motion to Compel, *see generally Defendants' Response to Plaintiffs' Fourth Motion to Compel and Request for Sanctions* [Docket No. 102], and also attended a hearing on the issues raised on May 8, 2015. *See Minutes of Proceedings*.

The Court denied Plaintiffs' Fourth Motion to Compel, finding once again that Defendants had properly served the privilege log and discovery responses on Plaintiffs. *Opinion and Order* at pg. 8.

### **Argument & Authorities**

In its opinion and order disposing of all three motions, the Court specifically stated its willingness to consider fees and costs to be assessed against Plaintiffs under Rule 37(a)(5) (A) & (B). *See generally Order and Opinion.*

Under Rule 37 of the Federal Rules of Civil Procedure, where a party has prevailed on a motion arising from failure to cooperate in discovery (*e.g.*, motion to compel or motion for protective order), “the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay the movant’s reasonable expenses incurred in making the motion, including attorneys’ fees.” FED. R. CIV. P. 37(a)(5)(A); *see also* FED. R. CIV. P. 37(a)(5)(B); *Fondren v. Republic American Life Ins. Co.*, 190 F.R.D 597, 601-02 (N. D. Okla. 1999) (fees awarded where deponent failed to answer deposition questions).

Defendants now request that the Court enter an order awarding Defendants their attorneys’ fees in the amount of \$4,509.00, accrued in connection with the Motion for Protective Order, Fifth Motion to Compel and Fourth Motion to Compel. In support of this motion, Defendants attach the Declaration of David M. O’Dens concerning the reasonable attorneys’ fees requested. *Cf.* LCvR54.2.

### **Relief Requested**

Defendants respectfully request that the Court grant this motion in connection with Plaintiffs' Motion for Protective Order, Defendants' Fifth Motion to Compel and Plaintiffs' Fourth Motion to Compel and award Defendants their reasonable attorneys' fees incurred in these matters.

Respectfully submitted,

/s/David M. O'Dens

David M. O'Dens, OBA # 11455  
*odens@settlepou.com*

**SettlePou**

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ATTORNEYS FOR DEFENDANTS

**Certificate of Service**

This certifies that on May 24, 2015, the undersigned electronically filed the forgoing document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, it does not appear that the Clerk of the Court can transmit a Notice of Electronic Filing to Plaintiffs and, therefore, the foregoing document was served via certified mail, return receipt requested on May 26, 2015, on:

Elbert Kirby, Jr., *pro se*  
Caleb Meadows, *pro se*  
1125 East 8<sup>th</sup> Street  
Tulsa, Oklahoma 74120

/s/ David M. O'Dens  
David M. O'Dens

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No. 14-CV-388-GKF-PJC

**DECLARATION OF DAVID M. O'DENS**

1. My name is David M. O'Dens. I am over the age of eighteen (18) years. I am of sound mind, capable of making this declaration and fully competent to testify to the matters stated in this declaration. I have personal knowledge of each of the matters stated in this declaration and they are true and correct.

2. I am an attorney licensed to practice in the States of Oklahoma and Texas, a shareholder with the law firm of SettlePou and the Chair of SettlePou's Creditor's Rights Division. In that capacity, I was employed to represent Defendants in this action.

3. I was licensed to practice law by the Oklahoma Supreme Court as a Legal Intern in 1984 and as an attorney in 1985 and by the Texas Supreme Court

as an attorney in 1989. I have been engaged in the continuous practice of law since 1984.

4. I am familiar with the customary and reasonable attorneys' fees charged in this type of case.

5. I am also a custodian of records for SettlePou with respect to the representation of Defendants in this lawsuit. I am familiar with the manner and the method in which SettlePou maintains its books and records. SettlePou keeps these books and records in the regular course of its business. It is the regular course of SettlePou's business for an employee with personal knowledge of each transaction or event to make a record of the transaction or event at or near the time of the transaction or event. These books and records are maintained by employees and agents whose duties it is to maintain the books and records accurately and completely.

6. I have reviewed the books and records of SettlePou with respect to the representation of Defendants in this lawsuit. The business records of SettlePou support the statements contained in this declaration. I am authorized to make this declaration and it is submitted as proof of the attorneys' fees that Defendants incurred in connection with Plaintiffs' Motion for Protective Order [or] Alternatively Motion for Sanctions [Docket No. 80], Plaintiffs' Fourth Motion to



Compel and Request of Sanctions [Docket No. 94], and Defendants' Fifth Motion to Compel and Brief in Support [Docket No. 93], as further detailed below.

7. My services and the services of SettlePou were and are necessary and the expenses incurred are reasonable in that Defendants were required to respond to Plaintiffs' Motion for Protective Order and Fourth Motion to Compel, and Defendants were required to file their Fifth Motion to Compel due to Plaintiffs' failure to properly respond to discovery. Defendants were also required to attend a hearing on all three motions.

8. I am personally familiar with the attorneys' fees accrued in this cause and certify that the services rendered were reasonable and necessary legal services regarding this matter. In rendering the services related to Plaintiffs' Motion for Protective Order and Fourth Motion to Compel and Defendants' Fifth Motion to Compel, SettlePou has: reviewed Plaintiffs' Motion for Protective Order and prepared and filed a response to same; reviewed pleadings in relation to Plaintiffs' failure to respond to discovery; prepared and filed Defendants' Fifth Motion to Compel; reviewed Plaintiffs' Fourth Motion to Compel and prepared and filed a response to same; exchanged e-mail correspondence with local counsel concerning the motions and hearing in relation to same, and prepared for, attended and

participated and testified in a hearing in Tulsa, Oklahoma, on May 8, 2015, concerning all three discovery motions.

9. As of the date this affidavit was prepared and executed, the attorneys handling this case with respect to the matters described above have spent time rendering the legal services generally described above as follows:

Name/Position	Year Admitted	Hours	Hourly Rate	Amount
David M. O'Dens (Attorney)	1985 (Oklahoma) 1989 (Texas)	16.7	\$270.00	\$4,509.00

A true and correct copy of my "Timekeeper Worked Detail Report" (redacted) for the work performed as set out above is attached to this declaration. I have reduced the total hours for the time entries on April 8, 10, 14-15, 17, 20-21, 23 and 28, 2015, to reflect the actual time spent on the described tasks.

10. My normal hourly rate charged to clients on litigation matters is \$460.00 per hour. However, with respect to matters referred by Ocwen Loan Servicing, LLC, my firm has agreed to bill for my time at a reduced rate of \$270.00 per hour.

11. In my opinion, the reasonable hourly charges rendered by the attorneys handling this case are as stated above.

12. Based upon my review of the services rendered, the charges involved and my experience in handling matters of the same and similar nature, it is my

opinion that a fee of \$4,509.00 is a reasonable and necessary fee for services rendered.

13. In determining the reasonableness of the fee for the services rendered herein, I have considered the following:

(A) The time and labor required, the nature and complexity of the case, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(B) The fee customarily charged in the locality for similar legal services.

(C) The amount involved and the results obtained.

(D) The time limitations imposed by the circumstances.

(E) The experience, reputation, and ability of the lawyer or lawyers performing the services.

14. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 24, 2015.



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David M. O'Dens

**Timekeeper Worked Detail Report**

Worked between 04/08/2015 thru 04/28/2015

Employee Id  
Date Worked  
Client Name  
Matter Number

		Actual Hours Description		Printed Hours	
		Actual Rate Notes		Printed Rate	
Date Worked	Work Status	Entry No.	Actual Dollars Codes	Printed	
DMO: ODENS, DAVID					
04/08/2015					
Ocwen Loan Servicing, LLC: OCWENFC					
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.					
04/08/2015	Billed	957075	6.80	1.60	
				270.00	
				1,836.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				Actual Hours	Actual Dollars
				6.80	1,836.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				Printed Hours	Printed Dollars
				1.60	432.00
Total For 04/08/2015				Actual Hours	Actual Dollars
				6.80	1,836.00
				Printed Hours	Printed Dollars
				1.60	432.00
04/09/2015					
Ocwen Loan Servicing, LLC: OCWENFC					
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.					
04/09/2015	Billed	957079	8.80	3.30	
				270.00	
				2,376.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				Actual Hours	Actual Dollars
				8.80	2,376.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				Printed Hours	Printed Dollars
				3.30	891.00
Total For 04/09/2015				Actual Hours	Actual Dollars
				8.80	2,376.00
				Printed Hours	Printed Dollars
				3.30	891.00
04/10/2015					
Ocwen Loan Servicing, LLC: OCWENFC					
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.					



## Timekeeper Worked Detail Report

Worked between 04/08/2015 thru 04/28/2015

Employee Id  
Date Worked  
Client Name  
Matter Number

		Actual Hours		Description	Printed Hours		
		Actual Rate		Notes	Printed Rate		
Date Worked	Work Status	Entry No.	Actual Dollars	Codes	Printed		
DMO: ODENS, DAVID							
04/15/2015							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
04/15/2015	Billed	957574	2.80	DRAFT DEFENDANTS' FIFTH MOTION TO COMPEL (6);		1.00	
			270.00			270.00	
			756.00			270.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.80	756.00	1.00	270.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.80	756.00	1.00	270.00
Total For 04/15/2015				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.80	756.00	1.00	270.00
04/16/2015							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
04/16/2015	Billed	957833	2.40			0.70	
			270.00			270.00	
			648.00			189.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.40	648.00	0.70	189.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.40	648.00	0.70	189.00
Total For 04/16/2015				<u>Actual Hours</u>	<u>Actual Dollars</u>	<u>Printed Hours</u>	<u>Printed Dollars</u>
				2.40	648.00	0.70	189.00
04/17/2015							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
04/17/2015	Billed	958198	3.20	REVISE DRAFT OF DEFENDANTS' FIFTH MOTION TO COMPEL (4);		1.70	
			270.00			270.00	
			864.00			459.00	





**Timekeeper Worked Detail Report**

Worked between 04/08/2015 thru 04/28/2015

Employee Id  
Date Worked  
Client Name  
Matter Number

		<i>Actual Hours</i>		<i>Description</i>		<i>Printed Hours</i>	
		<i>Actual Rate</i>		<i>Notes</i>		<i>Printed Rate</i>	
<i>Date Worked</i>	<i>Work Status</i>	<i>Entry No.</i>	<i>Actual Dollars</i>	<i>Codes</i>		<i>Printed</i>	
<b>DMO: ODENS, DAVID</b>							
<b>04/23/2015</b>							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
04/23/2015	Billed	959560	2.20	EXCHANGE OF E-MAILS WITH BRIAN RAYMENT RE: HEARING ON MAY 8, 2015, ON VARIOUS DISCOVERY MOTIONS (.2);		0.70	
			270.00			270.00	
			594.00			189.00	
<b>Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.20	594.00	0.70	189.00
<b>Total For Ocwen Loan Servicing, LLC: OCWENFC</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.20	594.00	0.70	189.00
<b>Total For 04/23/2015</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.20	594.00	0.70	189.00
<b>04/28/2015</b>							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
04/28/2015	Billed	959578	2.30	TELEPHONE CONFERENCES WITH NEAL TOMLINS RE: HEARING ON DISCOVERY MATTERS (.2); REVISE DRAFT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' FOURTH MOTION TO COMPEL AND FOR SANCTIONS (.3).		0.80	
			270.00			270.00	
			621.00			216.00	
<b>Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.30	621.00	0.80	216.00
<b>Total For Ocwen Loan Servicing, LLC: OCWENFC</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.30	621.00	0.80	216.00
<b>Total For 04/28/2015</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				2.30	621.00	0.80	216.00
<b>Total For DMO: ODENS, DAVID</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				41.90	11,313.00	14.30	3,861.00
<b>Report Totals</b>				<b>Actual Hours</b>	<b>Actual Dollars</b>	<b>Printed Hours</b>	<b>Printed Dollars</b>
				41.90	11,313.00	14.30	3,861.00



**Timekeeper Worked Detail Report**

Worked between 05/07/2015 thru 05/08/2015

Employee Id  
Date Worked  
Client Name  
Matter Number

		Actual Hours		Description	Printed Hours		
		Actual Rate		Notes	Printed Rate		
Date Worked	Work Status	Entry No.	Actual Dollars	Codes	Printed		
DMO: ODENS, DAVID							
05/07/2015							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
05/07/2015	Work-In-Process	962373	6.20	TRAVEL TO TULSA; CONFERENCE WITH NEAL TOMLINS RE: PREPARATION FOR HEARING ON DISCOVERY MOTIONS; PREPARE NOTES RE: SAME; [REDACTED]	6.20		
			270.00			270.00	
			1,674.00			1,674.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				6.20	1,674.00	6.20	1,674.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				6.20	1,674.00	6.20	1,674.00
Total For 05/07/2015				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				6.20	1,674.00	6.20	1,674.00
05/08/2015							
Ocwen Loan Servicing, LLC: OCWENFC							
14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.							
05/08/2015	Work-In-Process	962382	7.20	ATTEND HEARING ON DISCOVERY MOTIONS AND MOTION FOR ATTORNEYS' FEES; PRESENT TESTIMONY IN SUPPORT OF SAME; CONFERENCE WITH NEAL TOMLINS RE: RESULTS OF HEARING; PREPARE NOTES RE: SAME; TRAVEL TO DALLAS	7.20		
			270.00			270.00	
			1,944.00			1,944.00	
Total For 14-0453: US BANK NATIONAL ASSOCIATION, ET AL V. ELBERT KIRBY, JR.				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				7.20	1,944.00	7.20	1,944.00
Total For Ocwen Loan Servicing, LLC: OCWENFC				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				7.20	1,944.00	7.20	1,944.00
Total For 05/08/2015				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				7.20	1,944.00	7.20	1,944.00
Total For DMO: ODENS, DAVID				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				13.40	3,618.00	13.40	3,618.00
Report Totals				Actual Hours	Actual Dollars	Printed Hours	Printed Dollars
				13.40	3,618.00	13.40	3,618.00